

## Interdiction: Legality, Effectiveness and the Way Forward

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### Introduction

Interdiction is a prime means of implementation of the Proliferation Security Initiative (PSI) and several US co-sponsored UN Security Council (UNSC) resolutions imposing sanctions on North Korea and Iran.<sup>1</sup> This paper reviews and updates such interdiction efforts<sup>2</sup>, examines their general legality and effectiveness, and suggests ways and means to improve upon them.

PSI was announced by then President George W. Bush on 31 May 2003 in Krakow, Poland as an ‘activity’ designed to prevent the spread of weapons of mass destruction (WMD), their delivery systems and related materials from entering or leaving ‘states of proliferation concern’.<sup>3</sup> The focus was to be on interdiction because of the fear of rapid growth in states and groups pursuing WMD programs, worries of an expanding nexus between WMD and terrorism, and gaps in the existing non-proliferation architecture. It was thought that interdiction could fill the gaps by stopping proliferation-related exports from states whose activities fall outside existing source-based nonproliferation regimes. At the least, it was assumed that it would deter suppliers and customers and make proliferation more costly and difficult. Although interdiction was and is not novel to PSI, the focus on this tool has elevated consideration of its use at borders, in ports, in the air and at sea.

The original concept was for an *ad hoc* ‘coalition of the willing’ to interdict vessels carrying WMD and related materials<sup>4</sup> moving from and to North Korea and Iran. It was to be an ‘activity’ outside the UN system that would not be institutionalized and thus not constrained by cumbersome decision-making processes and second – guessing. Independence of rapid action was paramount. The U.S. would lead this effort to undertake interdictions at will, albeit only for “good cause” and “consistent with existing international law”.<sup>5</sup>

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<sup>1</sup> Secrecy surrounds such interdictions and they are seldom publicly attributed to particular programs. Indeed, the basis for particular interdictions is often conflated mixing PSI and specific UNSC resolutions at the convenience and to the legal benefit of the interdictor.

<sup>2</sup> This is in part an update of Mark J. Valencia, The Proliferation Security Initiative: a glass half-full, *Arms Control Today*, v. 37, n. 5, June 2007.

<sup>3</sup> Mark T. Esper and Charles A. Allen, The PSI: taking action against WMD proliferation, *The Monitor*, v.10, n. 1, Spring 2004, p.4.

<sup>4</sup> The DPRK is thought to have a stockpile of chemical weapons and can produce and deliver biological weapons as well. Jae-soon Chang, Analysts: N. Korea’s chemical arms as grave as nukes, *Associated Press*, 18 June 2009.

<sup>5</sup> The Proliferation Security Initiative Statement of Interdiction Principles, Paris, 4 September 2003; <http://www.proliferationsecurity.info/principles.pop>

The Bush administration clearly had high hopes and expectations for PSI. On the first anniversary of its initiation, John Bolton, then undersecretary of state for arms control and international security, proclaimed that PSI would evolve to the point where it “will have shut down the ability of persons, companies or other entities to engage in this deadly trade”.<sup>6</sup> He claimed that PSI was “succeeding because it is based on practical actions that make maximum use of each country’s strengths to counter proliferation. The partnerships being forged, the contacts being established, the operational readiness being enhanced through PSI is all helping to create a lasting basis for co-operative action against proliferation”. The Bush administration made PSI a key foreign policy and defense goal in 2005, and Congress approved \$50 million to help other nations support the initiative.<sup>7</sup>

On its second anniversary, in May 2005, then Secretary of State Condoleezza Rice claimed that the United States and its PSI partners had undertaken 11 successful intercepts since its inception, including the prevention of two WMD-related deliveries to North Korea as well as the blocking of the transfer of ballistic missile-related and nuclear program-related materials to Iran.<sup>8</sup> A 12<sup>th</sup> successful PSI interdiction was subsequently announced. However the details of these interdictions were purposely left vague. On its third anniversary, these claims of success were repeated by Robert Joseph, Bolton’s replacement, who, on PSI’s fifth anniversary, increased the figure to ‘more than 30’.<sup>9</sup>

A few weeks after PSI’s third anniversary, representatives of 65 states met in Krakow to discuss PSI political, policy and legal issues. The chairman of the conference, Polish Ambassador Tadeusz Chomicki, reiterated the claims of PSI’s success including providing a “platform” for impeding traffic in WMD and related materials, enhancing numerical and geographic support, and improving national capacities to interdict shipments of proliferation concern.<sup>10</sup> However, detailed information to support these claims was not made available. On its sixth anniversary, the U.S. hosted a meeting in Miami for PSI participants from the Western Hemisphere. PSI exercises have been held frequently. In one of the largest yet, more than 2000 personnel from 19 countries participated in exercise Deep Sobre 2 in Singapore in October 2009.<sup>11</sup>

PSI and other US-driven supportive efforts have improved the awareness of the danger and urgency of the problem and the focus on interdiction has probably constrained some trade in WMD, their delivery systems and related materials, or at least forced rogue traders to change their tactics. PSI exercises have increased national capacities for co-

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<sup>6</sup> John Bolton, Under Secretary for Arms Control and International Security, Remarks to the First Anniversary Meeting of the Proliferation Security Initiative, Krakow, Poland, 31 May, 2004.

<sup>7</sup> U.S. sets new defense strategy, [www.DefenseNews.com](http://www.DefenseNews.com), 21 March 2005; U.S. wants greater co-operation in WMD interdiction, *Middle East Newslines*, 9 March 2005.

<sup>8</sup> Proliferation Security Initiative marks second anniversary, [ww.i-Newswire.com](http://www.i-Newswire.com), 1 June 2005; US intercepts two deliveries of nuclear material for North Korea, *The Korea Herald*, 2 June, 2005

<sup>9</sup> State’s Joseph urges “Diplomacy of action” against WMD threat, <http://usinfo.State.gov/evr/Archive/2005/Aug/17-206543.html>; Seo-Hang Lee, Key issues of PSI and recent developments, *The Korea Herald*, 23 April 2009.

<sup>10</sup> ‘High level political meeting’, Warsaw, 23 June 2006, <http://www.psi.msz.gov.pl/>

<sup>11</sup> US-led initiative to avert WMD transfer holds drill in Singapore, *Kyodo News*, 27 October 2009.

ordinated detection and interdiction of suspect shipments. And with the United States having successfully negotiated ship-boarding agreements with the countries whose flags fly on the bulk of the world's ships, flag state consent for boarding to search for WMD has become an expectation for and of many states --- but not a legal obligation. Most important, PSI has evolved and metamorphosed from a focus on interdiction of ships at sea, to inspection in ports, to carriage of WMD by aircraft, and – for the United States – to disruption of financial networks involved or supporting such trafficking.

However, much water has flowed under the stern since PSI's early heady days of full steam ahead. Bolton and Joseph, PSI's architects and principal champions are long gone from the US government. Moreover, PSI has been criticized for lack of transparency and public accountability, stretching if not violating principles of international law, impeding legal trade, weakening the UN system, being politically divisive, diluting other non-proliferation efforts, and – for all these reasons – having limited effectiveness.

### **Recent Developments Involving Interdiction**

In response to North Korea's second nuclear test in May 2009, the UNSC passed in June a resolution (1874) that expands and tightens the sanctions specified in its earlier resolution (1718), passed in response to North Korea's first nuclear test in 2006. Some have argued that the earlier sanctions had almost no financial impact, in part due to lax enforcement.<sup>12</sup> But this resolution went a step further and endorsed "inspections" of suspect vessels entering or leaving North Korea.

In an attempt to choke off its main source of foreign currency,<sup>13</sup> the resolution imposes almost a complete embargo on the export and import of weapons from and to North Korea. It establishes detailed expectations and obligations for all states regarding the inspection of suspected prohibited cargo bound to or from North Korea on their territory or in their airports or ports.

It also 'calls upon' states to consent to inspection of their flag vessels on the high seas if there are 'reasonable grounds' to believe they are carrying prohibited cargo. If the flag state does not consent to the inspection, then "the flag state shall direct the vessel to proceed to an appropriate and convenient port for the required inspection." The resolution also prohibits the provision of fuel and of bunkering services to DPRK vessels believed to be carrying contraband. Moreover it expands financial sanctions related to WMD and missile production and provides for the designation of additional banned goods, entities and individuals and enhances monitoring of the implementation of these sanctions.

This appears to be a pretty robust resolution. However, it does not close all the gaps and leaves key terms undefined. The UNSC issued the resolution under Chapter III, Article 41 of the UN Charter which specifically does *not* authorize the use of force. That means

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<sup>12</sup> North Korea responds to U.N. with nuclear threats, *Reuters.com* 13 June 2009.

<sup>13</sup> According to the Institute for Foreign Policy Analysis, North Korea earns about \$1.5 billion a year from missile sales to Pakistan, Libya, Iran, Syria and Egypt. This foreign exchange allegedly supports its nuclear weapons program. North Korea arms trade funds nuclear-bomb work, UN panels, 19 November 2009.

that if a North Korean (or other) flagged vessel refuses to consent to inspection and further, refuses to proceed to an “appropriate port” as ‘directed’ for the ‘required’ inspection, the interdicting vessel could not threaten or use force to make it do so. If it did it would itself apparently be violating the resolution’s call that any inspection be consistent with international law and that all states refrain from any action that might aggravate tensions. This would be particularly so if the interdicted vessel were a state – owned or operated vessel used only for non-commercial purposes which, under the 1982 UN Convention on the Law of the Sea, has sovereign immunity. Thus all it could legally do is report the vessel to the UNSC sanctions committee. Meanwhile North Korea has already claimed that it is the victim of violations of international law that are detrimental to freedom of navigation.<sup>14</sup>

Moreover, the resolution contains several key terms that may be interpreted in different ways, such as “reasonable grounds” to believe that the vessel is carrying prohibited items. For example, the resolution appears to provide UN cover for the U.S. to unilaterally declare “reasonable grounds” and to interdict North Korean vessels on the high seas or even in others’ territorial waters – and thus erodes the age-old regime of freedom of navigation. The U.S. has said it will interdict North Korean vessels ‘but not forcibly board them’ and it announced that it was monitoring multiple DPRK ships suspected of carrying contraband.<sup>15</sup>

China and Russia resisted a binding use of force resolution with a threat of veto because they do not want to encourage U.S. military operations in their waters. They also fear that forceful interdiction will generate a violent response from North Korea and that the decision to interdict will be made unilaterally. To get China and Russia to agree to more binding and mandatory language, the U.S. should ‘walk the talk’ of President Obama’s promise to ‘listen’, ‘compromise’ and ‘co-operate’ in multilateral endeavors. In other words, it may have to give up control of the decision to interdict, the definition of ‘reasonable grounds’ to do so, and the actual interdiction itself. One way to do this would be to have interdictions/inspections on the high seas carried out by UN-flagged vessels. This would avoid direct confrontation between North Korea and its perceived arch enemy – the United States.

The U.S. also conducts naval operations aimed at intercepting Iranian ships carrying illegal cargo to or from Iran, implementing UNSC Resolution 1737 of 23 December 2006 and UNSC Resolution 1803 of 3 March 2008.<sup>16</sup> The resolutions ban trade with Iran of all items, materials, equipment, goods and technology including “dual” technology that could contribute to Tehran’s uranium enrichment program and call on countries to inspect cargoes of the Islamic Republic of Iran Shipping Lines (IRISL) – the national shipping

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<sup>14</sup> N.K. criticizes maritime blockade at U.N. meeting, *Yonhap*, 30 November 2009.

<sup>15</sup> Yoo Jee-ho, *Joon-Ang Daily*, U.S. is tracking a number of North Korean vessels, 25 June 2009.

<sup>16</sup> UNSC Resolution 1803 of 3 March 2008 calls on countries to inspect cargoes of the Islamic Republic of Iran Shipping Lines (IRISL) – the national shipping line - and Iran Air Cargo whenever there are suspicions that the firms might be transporting banned items usable in Iran’s nuclear or missile programs.

line - and Iran Air Cargo whenever there are suspicions that the firms might be transporting banned items usable in Iran's nuclear or missile programs.

Interdiction activities apparently increased during the last stages of the Bush administration and continued under the Obama administration. In August 2008, at US request, India blocked a North Korean plane from delivering cargo to Iran.<sup>17</sup> In late January 2009 it was reported that Cypriot authorities acting on a request by Israel and the U.S., detained an Iranian ship enroute to Syria.<sup>18</sup> Personnel from the US Navy amphibious transport dock San Antonio boarded the vessel, searched it and found weapons in the cargo. However, US officials said the arms did not violate U.N. weapons sanctions against Iran and the vessel was allowed to continue with its cargo. Also in January, Greek naval forces impounded a vessel bound for Iran carrying components for surface-to-surface missiles.<sup>19</sup> Earlier the Turkish navy seized a suspicious Iranian vessel bound for Venezuela carrying missiles labeled as tractor parts. On 12 December 2009, a large shipment of North Korean arms allegedly bound for Iran was seized by Thai authorities at the main Bangkok airport after a US intelligence tip-off.<sup>20</sup> And on 3 February 2010, Australian Prime Minister Kevin Rudd announced that authorities had blocked shipments of materials to Iran on the grounds that authorities had blocked they might be used in its nuclear program.<sup>21</sup>

But some interdictions had mixed results. In July 2009 the US Navy destroyer John S. McCain shadowed a North Korean freighter – the Kang Nam I – bound for Myanmar and suspected of carrying cargo banned by the relevant UNSC resolutions. But the ship abruptly turned about and returned to North Korea.<sup>22</sup> At least three ports denied entry to the ship.<sup>23</sup> US Chief of Naval Operations Admiral Gary Roughead claimed that the ship turned around because of the UNSC resolution.<sup>24</sup> But it was also suspected that the Obama administration's co-ordinator for US sanctions against North Korea, Philip Goldberg, persuaded the Malaysian government to block payments for the shipment which were allegedly moving through a Malaysian bank. The theory goes on to speculate that when the money was blocked Burma asked the ship to turn around. But another possibility was that the Kang Nam may have been false bait in a trap set by the DPRK to embarrass the U.S. and undermine support for the PSI and the UNSC Resolutions.<sup>25</sup> During the incident, China warned that any interdictions or inspections should "have ample evidence and proper cause."<sup>26</sup> This was reminiscent of the 1993 Yinhe debacle in

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<sup>17</sup> Jay Solomon, Krishna Pokharel and Peter Wonacolt, North Korean plane was grounded at U.S. request, 2 November 2008.

<sup>18</sup> Cyprus stops Iranian arms ship to Syria, *Reuters*, 30 January 2009.

<sup>19</sup> Sam Orez, Greece and Israel seize vessels with suspicious cargoes bound to Iran and Gaza, *The Cutting Edge*, 10 February 2009.

<sup>20</sup> Thomas Fuller and Choe Sang-hun, Thais say North Korea arms were Iran-bound, *The New York Times*, 1 February 2010.

<sup>21</sup> *Seattle Post-Intelligence*, "Australia blocks suspicious shipments to Iran," 3 February 2010.

<sup>22</sup> Kevin Baron, Keating: North Korean freighter's moves a mystery, *Stars and Stripes*, 22 July 2009; P.S. Suryanabayana, We will act: Singapore, *The Hindu*, 21 July 2009.

<sup>23</sup> Doubts in White House on approach to N. Korea, *Los Angeles Times*, 15 July 2009.

<sup>24</sup> U.N. credited for changing ship's course, *The Japan Times*, 6 July 2009.

<sup>25</sup> David E. Sanger, Second thoughts on North Korea's inscrutable ship, *The New York Times*, 1 July 2009.

<sup>26</sup> N. Korean arms ship passes China, *Arab Times*, 25 June 2009.

which the Clinton administration alleged that the Chinese cargo ship was carrying precursors for chemical warfare to Iran. That ship was searched in Dammam, Saudi Arabia over China's protests and no trace of precursors was found--much to the embarrassment of the U.S.<sup>27</sup>

Shortly after North Korea's first nuclear test in 2006, the same Kang Nam was detained in Hong Kong under suspicion of violating UNSC Resolution 1713. But it was found to not be carrying any cargo.<sup>28</sup> In August 2009, India detained and inspected the North Korean ship Mu San.<sup>29</sup> The Indian government said that the vessel had entered its waters illegally and was carrying equipment and material to Burma to help it build a nuclear reactor. However nothing illegal was found.<sup>30</sup> In September 2009, four North Korean containers allegedly holding items related to chemical weapons bound for Syria were seized in the port of Busan from a Panamanian – registered freighter.<sup>31</sup> But others reported that “nothing particular was discovered -----.”

The financial weapon was also used. In September 2008, the US Treasury imposed sanctions against Iran's national shipping line, IRISL, and 18 affiliates thus targeting most of Iran's shipping sector. The sanctions bar any transactions between US citizens and IRISL and freeze any assets the companies have within US jurisdiction. The basis for the sanctions is that the IRISL facilitates cargo transfers for UN-designated proliferators and falsifies documents and uses deceptive schemes to hide its activities. The U.S. hoped that insurers would shy away from doing business with the shipping line. IRISL responded by calling the allegations false and the sanctions illegal.<sup>32</sup> Iran says IRISL is not a government company but is privately owned and that the sanctions violate the terms of the UNSC resolution that specifically allows shipment of nuclear material to the Russian-made nuclear power plant at Bushehr.

Regarding expansion of PSI participation, after months of hedging and fierce internal and public debate, South Korea pledged to join and actively participate in PSI.<sup>33</sup> This was a marked turnabout from former President Roh Moo Hyun's administration which refused to join PSI because it could provoke a clash with North Korea. Indeed, North Korea has repeatedly warned South Korea that its participation in PSI would result in war. After South Korea announced its decision to fully participate in PSI, North Korea said it could no longer guarantee the safe passage of US and South Korean naval or civilian ships in neighboring waters.<sup>34</sup> Understandably, there still seems to be some hesitation by South

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<sup>27</sup> Tim Savage, Too much importance attached to ship of fools, *Napsnet Policy Forum Online* 21 July 2009.

<sup>28</sup> Choe Sang-Hun, U.S. destroyer shadows North Korean ship, *International Herald Tribune*, 21 June 2009.

<sup>29</sup> Korean ship may be booked under Indian Maritime Act, *The Times of India*, 17 August 2009.

<sup>30</sup> Ben Joyce, N. Korean ship seized under UN 'authority', *The Militant*, v. 73, n. 2, 24 August 2009.

<sup>31</sup> *The Dong-A-Ilbo*, 6 October 2009.

<sup>32</sup> Arshad Mohammed and Glenn Somerville, US slaps sanctions on Iranian shipping company, *Forbes .com*, 11 September 2008; U.S. slaps sanctions on overseas companies, *Associated Press*, 2 February 2009.

<sup>33</sup> Weapons: South Korea joins the posse, *NBC*, 17 April 2009; Leave PSI to government: Yu, *The Korea Herald*, 23 April 2009.

<sup>34</sup> South Korea deviated from previous rules of engagement in West Sea clash, <http://english.hani.co.kr/popups/print.hani?ksn=387071>

Korea in implementing interdiction in its waters. Nevertheless it did participate in PSI's European Regional Operational Experts Group meeting in Poland in June 2009.<sup>35</sup> And it has implemented an internet-based monitoring system to track the real time flow of inter-Korean shipments so as to prevent transfer of restricted items.<sup>36</sup>

Recent adherents to PSI include Bosnia, Croatia, Mongolia, Montenegro, Qatar, Slovenia, Turkey, Ukraine and the United Arab Emirates.<sup>37</sup> New Zealand stepped up its PSI efforts offering ships to help patrol the Persian Gulf.<sup>38</sup> And even China seized a shipment of the strategic metal vanadium bound for North Korea.<sup>39</sup> However, this was consonant with China's domestic policy of restricting export of rare minerals. India also seems to be taking a more supportive position toward PSI and ironically this is supported by China,<sup>40</sup> another critical non-PSI participant. India has harmonized its export controls with those of the NSG (and the MTCR) and its WMD Act of 2005 meets UNSCR 1540 obligations. Moreover it has banned all exports and imports of nuclear or ballistic missile related items and expanded its definition of technology to cover the entire range of proliferation-relevant activities.<sup>41</sup> And Japan has finally passed a bill allowing it to inspect DPRK ships and aircraft cargoes commensurate with the UNSC Resolution 1874.<sup>42</sup>

### **Enter the Obama Administration**

The U.S. now has a new administration and has entered a new era in foreign policy. President Obama has endorsed PSI and proposed expanding it to eradicate nuclear black market networks, and institutionalizing it as well.<sup>43</sup> Specifically he would like to formalize commitments and decision making and require countries to declare sensitive transfers of nuclear materials to an international agency, as well as to declare any undisclosed transfers as illegitimate and subject to seizure.<sup>44</sup> According to President Obama, "We must also build on our efforts to break up black markets, detect and intercept materials in transit, and use financial tools to disrupt this dangerous trade. Because this threat will be lasting, we should come together to turn efforts such as the Proliferation Security Initiative and the Global Initiative to Combat Nuclear Terrorism into durable international institutions. And we should start by having a Global Summit on Nuclear Security that the United States will host within the next year."<sup>45</sup>

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<sup>35</sup> S. Korea begins activity as PSI member, *Yonhap*, 22 June 2009

<sup>36</sup> Gov't to launch inter-Korean shipment monitoring system, *KBS Global*, 28 January 2010.

<sup>37</sup> Control of the world's oceans prelude to war? *Global Research*, 30 January 2009; NNSA achieves first major milestone in project to prevent nuclear smuggling in Mongolia, *NNSA*, Washington, 18 November 2008; US takes poke at Iran in signing UAE civil nuclear deal, *AFP*, 16 January 2009.

<sup>38</sup> <http://www.stuff.co.nz/national/politics/2757462/moving-out-of-the-Anzus-rut>, 17 August 2009.

<sup>39</sup> Lucy Hornsby and Benjamin Kan Lim, China seizes smuggled metal bound for North Korea, *Reuters*, 28 July 2009.

<sup>40</sup> Lalit K. Jha, N-deal a success story of Bush Administration: Lugar, *NDTU.com*, 17 October 2008.

<sup>41</sup> India bans trade of nuke items with North Korea, *Press Trust of India*, 27 October 2009; China moderates stand on nuke waiver for India, *Times of India*, 8 September 2008; Anupan Sri Vastava, NSG waiver for India, *PacNet Newsletter*, 8 September 2008

<sup>42</sup> Transfer of power/DPJ to submit N. Korea cargo inspections bill, *Yomuri Shimbun*, 2 September 2009.

<sup>43</sup> Obama to encourage India, Pak to sign CTBT, resolve Kashmir, *ndtv.com*, 25 September 2008.

<sup>44</sup> Elaine M. Grossman, World at risk, *Global Security Newswire*, 2 December 2008.

<sup>45</sup> Obama's remarks at Hradcany Square in Prague, *Thaiindian News*, 5 April 2009; the summit is planned for April 2010.

The Obama administration certainly has its work cut out for it regarding PSI. Some commentators argue that developments in biotechnology are threatening to render current biological and chemical weapons treaties unenforceable. Specifically, the proliferation of new, small mobile germ and chemical production facilities and new rapid production techniques that obviate the need for stockpiling mean that prevention of biological and chemical WMD proliferation may not be possible.<sup>46</sup> Adding to the pessimism is that some analysts think DPRK's massive stockpile of chemical weapons is as threatening as its nuclear program.<sup>47</sup> Moreover the indigenous capability to produce nuclear WMD components based on dual-use technology is spreading rapidly.<sup>48</sup> According to some doubters like William Perry, former US Secretary of Defense, it is a "hopeless task" to try and control such technology.<sup>49</sup>

On the other hand, some within the White House consider talks with North Korea futile and want to focus on blocking DPRK exports of banned material as well as its imports of weapons-related material, by land, air and sea.<sup>50</sup> While the new administration's initial rhetoric has been lofty and well-meaning, the situation continues to be quite dire. It is very important that the Obama administration not be lulled into a sense of complacency by the optimistic rhetoric regarding PSI and interdiction of PSI's proponents. Indeed, it is critical that PSI effectiveness be improved if there is to be any hope of stemming the proliferation of WMD.

### **PSI Effectiveness**

It is difficult to evaluate the effectiveness of PSI interdictions because of the secrecy surrounding them and confusion regarding what constitutes a PSI action and measures of its success. Some interdictions that are cited as successes were carried out in pursuance of US law and existing legal authorities so it is unclear what additional contribution was made by PSI. Similarly, some interdictions were made under various UN resolutions barring the transfer of missiles and certain materials to or from Iran and North Korea. It also appears as if PSI proponents are trying to expand its achievements to include custom officials' denial of export licenses as well as countries' denial of overflight rights.<sup>51</sup> One official claimed that a PSI success was when "you stop anything from going to a proliferation destination". Others claimed that interdictions were not a measure of success but rather it was the growing individual and collective capabilities of participants to curb proliferation.

Also undermining PSI effectiveness are legal lacunae such that state and non state actors that want to avoid PSI interdictions can still legally transport WMD components on their own flag vessels or aircraft or on those of non-participating states. And government ships operated for non-commercial purposes have sovereign immunity under the 1982

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<sup>46</sup> Judith Miller, Arms control racing time and technology, *New York Times*, 6 December 2008.

<sup>47</sup> Hae-soon Chang, analysts: N Korea's chemical arms as grave as nukes, *Associated Press*, 18 June, 2009.

<sup>48</sup> Jofi Joseph, The Proliferation Security Initiative: can interdiction stop proliferation, *Arms Control Today*, June 2004.

<sup>49</sup> Stephen Zunes, Missile love in Pakistan, *Foreign Policy in Focus Project*, June 2003.

<sup>50</sup> Paul Richter, Doubts in White House on approach to N. Korea, *Los Angeles Times*, 14 July 2009.

<sup>51</sup> Wade Boese, Interdiction Initiative successes assessed, *Arms Control Today*, <http://www.armscontrol.org>

UN Convention on the Law of the Sea.<sup>52</sup> As long as the U.S. remains outside the Convention which is seen as providing the framework for implementing PSI, many suspect PSI is meant to operate outside it.<sup>53</sup> Indeed this and the very secrecy that apparently enables PSI interdictions creates suspicion that the U.S. is employing politically motivated double-standards and extra legal methods. This undermines the willingness of other states to fully participate. Moreover, for some governments, public participation at the behest of the U.S. would be politically dangerous. And given past US intelligence failures, some countries may be reluctant to act on just the US say-so. In practical terms, PSI is further constrained by lacking an independent budget or coordinating mechanism.

But perhaps the greatest obstacle to PSI effectiveness is the fact that most of the ingredients for WMD are dual-use in nature, having both civilian and WMD application. Few if any countries export 'turn-key' WMD. The harsh reality is that countries and non-state actors can build their own WMD from dual-use components, using dual-use technologies and machines. This means that it is very difficult to make decisions regarding 'good cause' for interdiction and that such decisions will inevitably be politically influenced and based on who is sending or receiving the shipment. Moreover, a proliferation of interdictions of dual use materials may hamper legitimate commerce and thus engender opposition, even from allies.

Despite PSI, traffic in nuclear materials remains prolific. Commenting on what he feels was a failure of the US Congress's Commission on WMD, Commission member Henry Solkoski wrote "our commission has, in my view, muddled the security priorities on dealing with the spread of weapons of mass destruction."<sup>54</sup> He feels that despite the considerable attention the Commission devoted to the headlines-catching threats of nuclear and biological terrorism, the biggest security danger remains the increasing spread of nuclear weapons capabilities to new states and the growing nuclear capabilities of a number of existing nuclear weapons states. Mohamed El Baradei, then head of the International Atomic Energy Agency warned that there has been a "disturbingly high" number of recent reports of missing or illegally trafficked material--243 incidents between June 2007 and June 2008.<sup>55</sup> Although the total amount was small, it only takes a small amount in the wrong hands to create a catastrophe.

Even US allies are having trouble stopping such trade. Japanese companies played a key role in supplying equipment for Pakistan's nuclear arms program, including an electron microscope and ring magnets, a key device used to manufacture centrifuges to enrich uranium.<sup>56</sup> Worse, it is not even clear today that the A.Q. Khan network is completely out of business.<sup>57</sup> On 27 February 2009, the Kanagawa Prefectural police raided a Tokyo

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<sup>52</sup> However North Korea, Iran and the United States have not ratified the Convention.

<sup>53</sup> Emma Belchen, Throwing out the bath water, but keeping the baby, *Huffington Post*, 21 November 2008; The Proliferation Security Initiative: the legal challenge, *Bipartisan Security Group Policy Brief*, September 2003.

<sup>54</sup> *Global Security Newswire*, 2 December 2008.

<sup>55</sup> Gone missing, editorial, *The New Times*, 2 November 2008.

<sup>56</sup> Japan firms played into Khan's nuclear hands, *The Japan Times*, 17 February 2009.

<sup>57</sup> *Global Security Newswire*, 11 November 2008.

trading house on suspicion of attempting to export a machine part to North Korea that could be used to make WMD.<sup>58</sup> In April 2009, an Iranian-Canadian from Toronto was charged with allegedly attempting to export illegal dual-use nuclear technology to Iran via Boston, Toronto and Dubai.<sup>59</sup> In mid-July 2009, an Australian-owned ship registered in the Bahamas bound from North Korea to Iran was found by United Arab Emirates authorities to be carrying 10 container loads of weapons.<sup>60</sup> This interdiction supposedly delayed Iran's missile test because electronic navigation parts from North Korea were detained in the UAE.<sup>61</sup> Regarding the North Korean arms bound for Iran and seized by Thai authorities, it turned out that firms in five countries including New Zealand were involved in laundering the shipment.<sup>62</sup> In January 2010, a Taiwanese firm admitted it sent nuclear parts to Iran at the request of a PRC company.<sup>63</sup> Despite these "glitches", Philip Goldberg has claimed that US interdiction efforts are gaining growing support from countries and particularly banks.

Nevertheless, significant gaps in the sanctions system continue to grow. During Russia's spat with the U.S. over its invasion and defeat of Georgia, it hinted that it might halt all co-operation on efforts to rein in the Iranian nuclear program, presumably including PSI.<sup>64</sup> Russia was never that efficient or enthusiastic a PSI participant to begin with. Moreover key countries like China, India, Indonesia, Malaysia and Pakistan remain outside PSI.<sup>65</sup> And a study of insurance databases indicates that North Korean ships are likely not smuggling WMD because they are too closely watched.<sup>66</sup> Rather, North Korea is more likely to transport missiles or other weapons via air planes or ships of other flags. Movement of WMD components by air- while falling under PSI – may be more difficult to detect and prevent. Worse the WMD components could take a roundabout land route from North Korea via China and Russia, which is harder to trace, or use cargo planes at night.<sup>67</sup> North Korea could also export weapons by building assembly factories in importing countries to circumvent an entry ban on its ships in ports. Or it could charter ships under the names of foreigners, falsify the country of origin, or do business through a third country. That is probably how it has been able to continue to export arms to Iran, Syria, Burma and Laos. Finally, there is always the possibility of using the "diplomatic pouch" to smuggle critical WMD elements.

On 2 February 2009 Iran launched its first satellite using a two or possibly three stage liquid-fuel Safir missile. It thus now has a ballistic missile capability to deliver its

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<sup>58</sup> Trader tried WMD-linked export to North, *The Japan Times*, 27 February 2009.

<sup>59</sup> Toronto man charged with trying to export nuclear technology to Iran, *CBC News*, 17 April 2009.

<sup>60</sup> Patrick Walters, Legal check on ANL arms ship, *The Australian*, 31 August 2009.

<sup>61</sup> Iran delays missile test due to row with N. Korea over parts delivery, *Xinhua News*, 8 December 2009.

<sup>62</sup> Firms in five countries camouflaged |N. Korea arms deal, *Chosun Ilbo*, 27 January 2010.

<sup>63</sup> Taiwanese firm says it sent nuclear parts to Iran, *Associated Press*, 9 January 2010.

<sup>64</sup> Stephen Blank, Russia and Iran's Missiles, <http://www.worldpoliticreview.com/articlePrint.aspx?ID=3269>, 10 February 2009

<sup>65</sup> Proliferation Security initiative exercise hosted by Japan shows growing interest in Asia but no sea change in key outsider states, *WMS Insights*, 13 October 2008

<sup>66</sup> North Korea ships likely not smuggling WMD, report says, 6 March 2009.

<sup>67</sup> N. Korea's arms export routes getting harder to track, *The Chosun Ilbo*, 29 June 2009.

supposed soon-to-be nuclear weapon capability.<sup>68</sup> Moreover North Korea tested its own long-range missile during a purported attempted satellite launch in what the U.S. and others, including the U.N., said was a contravention of UNSC Resolution 1718.<sup>69</sup>

But double standards abound, undermining PSI commitment from other countries. In August 2009 South Korea launched a satellite using missile technology that in theory is capable of delivering WMD.<sup>70</sup> However this act did not receive nearly the degree of criticism that was heaped on the DPRK for its similar launch. Adding to the appearance of double standards, Seoul will soon begin to export nuclear power plants.<sup>71</sup> It also wants to obtain “peaceful nuclear sovereignty” freeing itself from tight US restraints on reprocessing spent nuclear fuel.<sup>72</sup> Moreover some US approved shipments beg the question of under what conditions it is legal to transport WMD-related material.<sup>73</sup> Under a US led effort, some 1685 pounds of uranium has been retrieved from 11 countries – enough for six nuclear weapons. The uranium was secretly transported from Budapest to Siberia for safe-keeping. The shipments moved through the Mediterranean, the Strait of Gibraltar, and then through the Atlantic, the English Channel, the North and Norwegian seas and thence to Murmansk and onward by train.<sup>74</sup> Some moved by air.<sup>75</sup> This is in addition to the recovery of 225 kg of fresh and used HEU from US friends and allies. The DPRK has accused the U.S. of spreading WMD.<sup>76</sup> And what of UK shipments of spent nuclear fuel from Britain to Japan?<sup>77</sup> Why don’t these hazardous substances fall under the definition of WMD and “related materials banned by the PSI? Also the US nuclear deal with India ensures that foreign nuclear materials will flow into the country for nuclear power production, enabling India to divert its own uranium to bombs. Some argue that such shipments would violate the NPT which states in Article 1 that countries shall not in any way assist, encourage or induce any non-nuclear weapon state to acquire nuclear weapons (India is technically a non nuclear-weapon state under the NPT because it did not conduct a nuclear test before January 1967).<sup>78</sup> Nevertheless it does help US credibility that the Obama administration recognizes that “the Nuclear Nonproliferation Treaty obligations encompass disarmament as well as nonproliferation”.<sup>79</sup>

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<sup>68</sup> Boese, *supra* n. 51; in February 2010, the new director general of the IAEA, Yukiya Amino issued a report warning that Iran may be secretly working on developing such a nuclear warhead. Watchdog: Iran may be working on nuclear warhead, *cnn.com*, 18 February 2010.

<sup>69</sup> Hwang Doo-Hyong, U.S. warns N. Korea against long-range missile test, *Yonhap News*, 18 September 2008.

<sup>70</sup> R. Jeffrey Smith and Stella Kim, S. Korean launch raises questions, *Washington Post*, 18 August 2009.

<sup>71</sup> Seoul seeks to export nuclear reactors, *The Korea Herald*, 1 April 2009.

<sup>72</sup> Seoul wants sovereignty in peaceful nuclear development, *Chosun Ilbo*, 31 December 2009.

<sup>73</sup> Julian Ryall, North Korea threatens with a hardline action against Japan over sanctions, *Telegraph.co.uk*, 11 November 2008.

<sup>74</sup> Nuclear materials secretly transported, *cnn.com*, 23 October 2008.

<sup>75</sup> *World Nuclear News*, 7 July 2009.

<sup>76</sup> DPRK newspaper accuses US of spreading WMD’s, [www.chinaview.cn](http://www.chinaview.cn), 23 September 2008.

<sup>77</sup> U.K. nuke shipments slammed, *Japan Times*, 13 January 2010.

<sup>78</sup> Nuclear Non-Proliferation Treaty, *Wikipedia*, <http://en.wikipedia.org>

<sup>79</sup> US reports new diplomatic goals to IAEA, *Global Security Newswire*, 6 March 2009.

The US government bureaucracy seems to be a constraint on PSI.<sup>80</sup> The PSI is presently a bureaucratic ‘orphan.’<sup>81</sup> Originally it was managed within the National Security Council and while it still receives overall direction from the NSC, the State Department and the Defense Department manage pieces of it. It has not been institutionalized in the federal bureaucracy – and should be. Until it has a ‘home’ there will be confusion regarding who is in charge, how much it can spend for what purposes, and its priority relative to other needy programs.

The Implementing Recommendations of the 9/11 Commission Act of 2007 (P.L. 110-53) requires the President to include PSI activities for each involved government agency in his budget request. It also requires submission to Congress of joint DOD-DOS reports to include detailed three-year plans for PSI activities no later than the first Monday in February of each year. The Act also recommends establishing clear PSI authorities, responsibilities and structures, that PSI be expanded, that the US should use the intelligence and planning resources of the NATO alliance, make participation open to non-NATO countries and encourage Russia and China to participate. Thus the sense of Congress is that PSI should be strengthened and expanded by establishing a clear authority and budget for PSI coordination, and by increasing PSI cooperation with all countries. Indeed, a proposed bill, The Nuclear Weapons Threat Reduction Act of 2007 (S.1977), introduced on August 2, 2007, called for strengthening PSI through appropriate measures.<sup>82</sup>

The Obama administration cannot simply continue “business as usual” regarding the PSI. In November 2008, a GAO report found that the Bush administration had not issued a key directive to US agencies to guide the strengthening of PSI efforts nor had the required budget documents been provided. Moreover key agencies had not established performance indicators to assess PSI effectiveness nor have they outlined policies, procedures or funding requirements as requested by Congress. Such agencies include the State Department, the Defense Department, the US Navy, the US Coast Guard, the Department of Energy, the Homeland Security Department, Customs and Border Protection, the FBI and various intelligence agencies. Basically, they failed to establish performance indicators to assess PSI effectiveness and did not include PSI in their annual budgets. The State Department outright rejected the need for a joint PSI budget saying that the PSI is “a set an activities interwoven into the US government’s established diplomatic, military and law enforcement relations with other countries”. All this needs to change.

Perhaps as a tacit admission that the effort to stop the spread of WMD is faltering, the US Defense Department has initiated a high-level assessment of how to increase the effective

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<sup>80</sup> Peter Grail, GAO Report calls for revamped PSI, *Arms Control Today*, [http://www.armscontrol.org/act2008\\_12/PSI\\_revamped](http://www.armscontrol.org/act2008_12/PSI_revamped)

<sup>81</sup> Philip E. Coyle, III and Victoria Samson, The Proliferation Security Initiative: background, history and prospects for the future, International Commission on Nuclear Non-proliferation and Disarmament, January 2009.

<sup>82</sup> Members of the 109<sup>th</sup> Congress introduced eight bills and resolutions that called for strengthening, expanding, and funding PSI (S.Con.Res.36, H.Con.Res. 133, S.con.Res. 40, H.R. 422, H.R. 665, H.R. 5017/S. 3456, P.L. 109-102 (Section 599A). amd S/2566).

use of military forces to combat proliferation of WMD.<sup>83</sup> This in turn was seen as an attempt to implement a key relevant recommended action in the recently released Quadrennial Defense Review. The US Defense Department has tasked an ongoing project “Countering Weapons of Mass Destruction-Nuclear,” with reviewing military “authorities, responsibilities, concepts to detect, *interdict*, seize and destroy or defeat global WMD threats.”<sup>84</sup> This could result in sweeping changes in the effort to counter WMD proliferation. However, some experts question an increased role for the US military in thwarting WMD trade embedded in commercial shipping and policed by civilians.<sup>85</sup> Indeed what is needed is not more military force but “clear rules, sound intelligence [and] greater international co-operation”<sup>86</sup>

### **Whither PSI and Interdiction**

For PSI and interdiction to be fully successful will require near universal support. And even if global support is forthcoming, inadequate resources, intelligence, and capacity may ensure that a significant portion of WMD- component shipments will avoid detection and air or sea interdiction.

Most of PSI’s shortcomings stem from its *ad-hoc*, US-driven nature. Bringing it into the UN system and providing a budget for it as advocated by a US House of Representatives-approved bill<sup>87</sup> would rectify many of these shortcomings, close legal gaps and in the long run improve its effectiveness. One way to do this would be to seek a UNSC resolution authorizing the use of force for interdiction - on or over the high seas and in territorial waters---of WMD and related materials, either in specific cases, or in general.

PSI’s reach and effectiveness could also be improved by eliminating double-standards, increasing transparency and establishing a neutral organization to assess intelligence, coordinate and fund activities, and make recommendations or decisions regarding specific or generic interdictions. Such an organization – perhaps built on the UNSC 1540 Committee - if seen to be neutral, transparent, fair and objective, could answer key questions such as what combinations of actors and materials represent threats and what is ‘good cause’. It would also help avoid erroneous judgments and disagreements that might impede legitimate commerce or delay action. The organization would also give PSI a concrete structure with a consistent strategy and *modus operandi*, as well as a budget to fill gaps in interdiction and intelligence collection efforts. Moreover it could ensure that PSI activities stay within existing international law or serve as a vehicle for

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<sup>83</sup> Ellain M. Grossman, Pentagon might shift command responsibility for combating WMD spread, *Global security Newswire*, 12 February 2010.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> 110<sup>th</sup> Congress 1<sup>st</sup> Session, ‘A Bill to provide for the implementation of the recommendations of the National Commission of Terrorist Attacks Upon the United States, subtitle B-Proliferation Security Initiative, Sec. 1221. ‘Proliferation Security Initiative Improvements and Authorities, para. 2 “It is the sense of Congress\_ \_ \_ that the President should strive to expand and strengthen the Proliferation Security Initiative (PSI)\_ \_ \_ with a particular emphasis on\_ \_ \_ “Working with the United Nations Security Council to develop a resolution to authorize the PSI under international law”.

changing it. And it would also ensure that the effort complements other non-proliferation efforts rather than undermines them. It is imperative that PSI effectiveness be improved and bringing it into the UN system is the way to do so. The world is only a catastrophe away from a combination of WMD materials in the hands of a willing user.

## Endnotes